

IT IS ORDERED as set forth below:



Date: April 04, 2007

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: A05-84184-PWB
	:	
BRUCE A. PHILLIPS,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
	:	
WFI GEORGIA INC. f/k/a	:	
SUNTECH SYSTEMS, INC.,	:	
	:	
Plaintiff	:	ADVERSARY PROCEEDING
	:	NO. 06-9028
v.	:	
	:	
BRUCE A. PHILLIPS,	:	
	:	
Defendant.	:	

ORDER GRANTING DEBTOR'S MOTION TO DISMISS

WFI Georgia Inc. ("Plaintiff") alleges that BCC Systems, Inc. ("BCC") executed a promissory note in its favor that the Debtor, BCC's president, personally guaranteed. The Plaintiff alleges that the Debtor made certain false representations about the value of his residence that the

Plaintiff relied upon to its detriment. The Debtor seeks dismissal of the complaint for failure to state a claim for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure. Specifically, the Debtor contends the complaint should be dismissed because (1) the Plaintiff has failed to state a claim under § 523(a)(6); and (2) any oral representations about the Debtor's financial condition cannot serve as a basis for a claim under § 523(a)(2)(A).

Rule 12(b)(6) provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. When considering a Rule 12(b)(6) motion, the Court must consider the complaint in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint should not be dismissed unless it is clear that the plaintiff can prove no set of facts in support of his claim which would give him relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

11 U.S.C. § 523(a)(6)

The Debtor contends that the Plaintiff has failed in its original complaint to identify by code section the specific ground for the nondischargeability of its debt and that theoretically the Plaintiff's allegations could seek nondischargeability under either § 523(a)(2) or § 523(a)(6). In its amended complaint, it is evident that the Plaintiff is proceeding under a § 523(a)(2) theory. Because the Plaintiff has not pleaded the elements of a § 523(a)(6) claim or contested the Debtor's request for dismissal of such claim, the Court finds that the Plaintiff has failed to state a claim for relief under § 523(a)(6).

11 U.S.C. § 523(a)(2)(A)

The Debtor originally sought dismissal of the Plaintiff's complaint on the basis that the Plaintiff had failed to plead fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure, made applicable by Rule 7009 of the Federal Rules of Bankruptcy Procedure.

In response, the Plaintiff filed its amended complaint which includes the following allegations:

9.

[The Debtor] entered into the Promissory Note as President of BCC. [The Debtor] also entered into the Promissory Note as a personal guarantor for BCC.

10.

[The Debtor] put forth his personal property as collateral for his guaranty and security for BCC's indebtedness.

11.

In or around July 2005, [the Debtor] stated and represented that his residential property, located at 3205 Wood Valley Road, Atlanta, Georgia 30327, had general value and unencumbered equity equal to or greater than the amount due and owing from BCC and guaranteed by [the Debtor].

12.

Upon information and belief, prior to July 15, 2005, [the Debtor] made these statement and/or representations as to the character, quality, value and legal status of the property to Jeff A. Spranger ("Mr. Spranger") along with other employees of [the Plaintiff]. Upon information and belief, on July 15, 2005, [the Debtor] made these statements and/or representations to Mr. Spranger, and confirmed them by and through his words and/or actions of assent and signature to the July 15, 2005 Promissory Note.

In response to the amended complaint, the Debtor filed his supplemental brief in support of his motion to dismiss in which he contends that the Plaintiff's allegations that he made oral representations regarding the "character, quality, value and legal status" of property are oral representations respecting his financial condition and are not actionable under § 523(a)(2)(A). As a result, the Debtor contends that the Plaintiff's complaint fails to state a claim for relief and must be dismissed. Because the Debtor's supplemental brief raised a different basis for dismissal, the Court construed the brief as a renewed motion to dismiss and provided the Plaintiff with an opportunity to respond. The Plaintiff filed a brief in response in which it requests that the motion

to dismiss be denied because the Debtor's statements were not statements about his financial condition.¹

Section 523(a)(2)(A) provides an exception to a chapter 7 discharge for a debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud other than a statement respecting the debtor's or an insider's financial condition." The terms contained in the phrase "statement respecting the debtor's or an insider's financial condition" are not defined in the Bankruptcy Code. Courts have generally held, however, that because § 523(a)(2)(B) specifically covers statements *in writing* respecting a debtor's financial condition, § 523(a)(2)(A)'s exclusion of representations "*other than* a statement respecting the debtor's or an insider's financial condition" renders oral statements inactionable. Put simply, a fraudulent "statement respecting the debtor's or an insider's financial condition" renders a debt nondischargeable only if the statement is in writing. *See Rose v. Lauer (In re Lauer)*, 371 F.3d 406, 413 (8th Cir. 2004) ("Subsections 523(a)(2)(A) and (B) are mutually exclusive.").

Courts have split on whether the phrase "statement respecting a debtor's or an insider's financial condition" should be interpreted broadly or narrowly. *See Schneiderman v. Bogdanovich (In re Bogdanovich)*, 292 F.3d 104, 112-113 (2d Cir. 2002) (compiling cases). Under the broad

¹The Plaintiff has also requested that the affidavit of the Debtor attached to the supplemental brief be stricken. Typically a court does not consider evidence offered by a defendant who seeks dismissal of a complaint pursuant to Rule 12(b)(6). The allegations of the complaint are deemed true and the defendant seeks dismissal because the facts as stated in the complaint fail to state a claim as a matter of law. A court may consider evidence in connection with a Rule 12(b)(6) motion and, thus, treat the motion to dismiss as a motion for summary judgment, but only if the court has given all parties the reasonable opportunity to present all material made pertinent by a summary judgment motion. Because the Court's Order and Notice did not provide such notice to the Plaintiff of an intent to consider the Debtor's motion as a summary judgment motion, it is appropriate to exclude the Debtor's affidavit and attachments from consideration.

interpretation of “statement respecting a debtor’s or an insider’s financial condition,” such a statement is *any* oral communication about the debtor’s financial condition. The broad interpretation does not limit a “statement” to the traditional notion of “financial statement.” In other words, any oral statement by the debtor about an aspect of his financial condition, such as a debtor’s oral representation that he owns property free and clear of liens, cannot serve as a basis for a claim for false pretenses, false representations, or actual fraud under § 523(a)(2)(A). *E.g.*, *Engler v. Van Steinburg (In re Van Steinburg)*, 744 F.2d 1060, 1061 (4th Cir. 1984) (“A debtor’s assertion that he owns certain property free and clear of other liens is a statement respecting his financial condition. Indeed, whether his assets are encumbered may be the most significant information about his financial condition.”).

Under the narrow interpretation of “statement respecting a debtor’s or an insider’s financial condition,” an allegedly false or fraudulent oral statement or representation does not come within the exception of § 523(a)(2)(A) requiring a writing unless the statement “purport[s] to present a picture of the debtor’s overall financial health.” *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700, 714 (10th Cir. 2005). Thus, an oral statement “that present[s] a picture of a debtor’s overall financial health . . . analogous to balance sheets, income statements, statements of changes in overall financial position, or income and debt statements that present the debtor or insider’s net worth, overall financial health, or equation of assets and liabilities” cannot serve as a basis for a claim under § 523(a)(2)(A). *Id.* Arguably, the narrow interpretation permits a § 523(a)(2)(A) claim where the debtor made an oral representation only about the nature of his ownership of certain property, a result contrary to *Van Steinburg, supra*.

Under the facts and circumstances of this case, it is unnecessary for the Court to determine whether a broad interpretation or narrow interpretation of an oral “statement respecting

a debtor's or an insider's financial condition" is appropriate, because, under either analysis, the Court concludes the Debtor's oral representation is a statement respecting his financial condition and is not actionable under § 523(a)(2)(A).

The Plaintiff alleges that the Debtor made representations regarding the value of and unencumbered equity in his property and that "Upon information and belief, prior to July 15, 2005, [the Debtor] made these statements and/or representations as to the character, quality, value and legal status of the property to Jeff A. Spranger ("Mr. Spranger") along with other employees of [the Plaintiff]." (Amended Complaint, ¶ 12). Under the broad interpretation, the Debtor's oral statement regarding the "character, quality, value and legal status" of his residence is clearly a statement regarding his financial condition. Under the broad interpretation, because such statement was made orally and not in writing, the Plaintiff has no claim under § 523(a)(2)(A).

The result is the same under the narrow interpretation of the phrase "statement respecting a debtor's or an insider's financial condition." At the center of this analysis is the significance of the Plaintiff's allegation that the Debtor "put forth his *personal property* as collateral for his guaranty and security for BCC's indebtedness." (Amended Complaint, ¶ 10) (emphasis added). The Debtor contends that if the allegation is that he "put forth his *personal property* as collateral for his guaranty" and that he made a representation as to the value of *real property*, the statement regarding real property was offered to illustrate his general net worth and overall financial health. As a result, the Debtor contends, such representation is not actionable under § 523(a)(2)(A).

The Plaintiff contends that the Debtor has misread paragraph 10 and its statement about personal property. The Plaintiff contends that the "language [of paragraph 10] is contained within the Amended Complaint because the Promissory Note expressly identifies [the Debtor's] guarantee as a 'Personal Guarantee' to distinguish his liability on the debt from the liability of his company

BCC Systems. The word ‘personal’ is clearly used to denote [the Debtor’s] ownership of the guarantee and not to identify the property at issue as personal, rather than real property.” (Plaintiff’s Opposition to Supplemental Brief at 3-4, filed July 31, 2006). It appears that the Plaintiff is arguing that by “personal property” it meant that the Debtor pledged property he “personally owned” as opposed to the traditional definition of “personal property” which is “any movable or intangible thing that is subject to ownership and not classified as real property.” BLACK’S LAW DICTIONARY 1233 (7th ed. 1999). Thus, the Plaintiff contends that the Debtor’s representation as to the value of the real property, which it contends falls within the Debtor’s “personal property,” is a misrepresentation about the property’s value, but not a statement regarding his overall financial condition.

Viewing the facts favorably to the Plaintiff, the Court assumes for present purposes that the term “personal property” has the generous meaning the Plaintiff gives it. Even under the narrow interpretation of § 523(a)(2)(A), the alleged representation thus viewed is a statement of financial condition. The statements are effectively a representation of the Debtor’s general net worth.

The Plaintiff’s view of the case supports this conclusion. In the Plaintiff’s supplemental response, the Plaintiff states (Supplemental Response at 4):

If the facts alleged in the Amended Complaint are viewed in a light most favorable to [the Plaintiff], they reveal that [the Plaintiff] wanted to make sure that if it ever needed to institute legal proceedings to enforce [the Debtor’s] personal guarantee of his debt, a money judgment could be obtained and subsequent lien filed against his property on that judgment.

Thus, according to the Plaintiff’s own argument, the oral statement regarding the

residence was offered to illustrate the Debtor's overall net worth or financial health so that the Plaintiff would have some assurance of collection if it ever sought to enforce the Debtor's personal guarantee. As such, the statement was a statement regarding the Debtor's financial condition. Because it was not in writing, the Plaintiff has no claim for an exception to discharge based on an alleged fraudulent statement made by the Debtor under § 523(a)(2)(A).

In conclusion, the Court finds that the Plaintiff has failed to state a claim for relief under 11 U.S.C. §§ 523(a)(2) and 523(a)(6). It is, therefore,

ORDERED that the Debtor's motion to dismiss is GRANTED.

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Distribution List

Deborah S. Butera
Adorno & Yoss, LLC
Two Midtown Plaza
1349 West Peachtree St, NE
Atlanta, GA 30309

Kenneth Muhammad
Adorno & Yoss, LLC
Two Midtown Plaza
1349 West Peachtree ST, NE
Atlanta, GA 30309

Furman Smith, Jr.
Smith, White, Sharma & Halpern
1126 Ponce De Leon Avenue NE
Atlanta, GA 30306-4517